

IN THE  
**United States Court of Appeals  
for the Ninth Circuit**

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WM. T. ALVARADO SALES CO. and  
SPEE-DEE CHECKOUT SYSTEMS, INC.,  
Appellants,

vs.

SIDNEY S. RUBALOFF and ABRAHAM M. GROSS,  
individually and doing business as  
CHECK-A-MATIC CO.,  
Appellees

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WM. T. ALVARADO SALES CO. and  
SPEE-DEE CHECKOUT SYSTEMS, INC.,  
Appellants,

vs.

DU-MORE FIXTURE CO., INC.,  
Appellee

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**APPELLANTS' REPLY BRIEF**

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## APPELLANTS' REPLY BRIEF

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This brief is in reply to the two briefs of defendant-appellees Check-A-Matic Company and Du-More Fixture Company. The arguments of the appellee Check-A-Matic will be considered first and then the arguments of appellee Du-More.

## REPLY TO CHECK-A-MATIC-BRIEF

Issue is first taken with the appellants' inference at page 2, last paragraph of Check-A-Matic brief that appellants and the George patent claim a patent covering any check stand with any turntable. Appellants agree that their patent extends to a specific arrangement of elements as defined in the claims. Neither do appellants ignore any restrictions in the claims as alleged in the last paragraph on page 3 of the Check-A-Matic brief. The structure and combination defined in the claims is substantially more than, and different from, a simple substitution of one type of article conveyor for another in a grocery store check stand. The mounting of the rotatable turntable in the check stand of the George patent in the relationship defined in the claims was more than a substitution and, contrary to the contention labeled (a) at the top of page 4, was the first use of a turntable in a checkout counter or station. If by this latter reference appellee Check-A-Matic alludes to the Florence patent it neglects to point out that the Florence turntable is not a checkout device but is merely a rotating display device on which articles rotate continually until picked up by a customer. Similarly the argument labeled (b) at the top of page 4 is erroneous and improperly generalized because no prior patent cited uses a turntable and guide arm for deflecting food items off of the turntable. If by this reference Check-A-Matic alludes to the Price patent it neglects to point out that the Price device does not handle food items but only advances a succession of identical empty containers to some sort of undisclosed filling or processing apparatus.

### **Error No. 1 (Check-A-Matic, page 5)**

While the Court obviously received the information that the patentee George was the first to employ a turntable in a check stand there is nothing in the findings or minute order decision which indicated that the Court gave this fact any consideration in arriving at its decision. Contrary to the implication by appellee, appellants do not broadly claim any turntable in any check stand but this does not mean that the use of a turntable in the particular manner defined in the claims is not inventive.

### **Error No. 12A (Check-A-Matic, page 8)**

The cited patents, of course, speak for themselves as to what they do or do not disclose but appellee Check-A-Matic is inaccurate in stating that the Florence patent discloses the use of a turntable for advancing groceries to a checkout point. This statement is a corruption of the term "checkout point" as in no sense do the arcuate tables 6 of the Florence patent correspond in function to the checkout stand of a supermarket. Appellants' allegation of error 12A is submitted to be entirely accurate in that there is no disclosure in the prior art of a rotatable turntable having been used in a checkout stand, the stand being adapted to support a cash register for the purpose of checking the customers' purchases at a self-service store.

### **Error No. 4 (Check-A-Matic, page 9)**

Appellee's argument admits utility but seeks to avoid or deny improved action by comparing the generalities of the functions of movement of articles, checking of articles and disposing of articles. Certainly appellants do not contend and never have contended that the George check stand was the first to perform these functions. In its reference to the



Bradley patent, appellee Check-A-Matic fails to take into account in George the transverse movement of the articles of purchase from the outside of the check stand to the inside thereof to a point *directly and immediately* along side of the cash register position. The distinction between the George device and the Bradley device lies in the closer proximity of the articles to the cash register at the end of their motion on the George stand. This appellee conveniently disregards and the question is properly raised that if the function of the George stand is no improvement over the Bradley stand, why did the appellee Check-A-Matic adopt the George stand as its commercial article rather than the Bradley Stand? As pointed out by appellee at the top of page 10, Bradley shows the need for an attendant to unload the articles of a customer's purchase onto the belt but the George patent in suit eliminates the need for this attendant and still advances all articles of a purchase at least as close to the cash register as the Bradley belt with an attendant.

#### **Error No. 5 (Check-A-Matic, page 10)**

This allegation of error by appellants is reaffirmed as there is no point in the findings of the district court or comments of the court indicating that the improved results of the George stand were considered by the court. Appellee's contention that the inner side of the Bradley belt is as close to the cash register as the stopping point for articles on the George stand completely disregards the evidence at record page 107 that the *majority* of articles placed on a belt type check stand by the customer will be placed on the outside of the belt furthest from the cash register and the checker. At no place does the appellee controvert the fact that the George patent brings all articles closely adjacent the side of the cash register. Indeed they could not make such a contention as the accused stands all do the same thing.



## NOVEL RESULT IS NOT INCONSEQUENTIAL

(Check-A-Matic, page 12)

Appellee now attempts to belittle the advantage of bringing items too closely along side of the cash register as distinguished from a location at varying positions outwardly from the side of the cash register to the outer edge of a belt type check stand and they cite testimony referring to items located on the outside of a belt and on radially inwardly disposed positions of the turntable. Anyone will realize that extreme positions exist on any conveyor and it is misleading to compare the favorable extreme of one type stand with the unfavorable extreme of the other type stand. The point avoided by appellee is that the majority of the articles of a customer's purchase will be placed by the customer at the most convenient point which is the outer edge of the belt in a belt type stand and the outer periphery of a turntable in a turntable stand. The substantial improvement of the George stand over the belt type stand becomes immediately apparent when considering this position in which the majority of items are unloaded because the George stand will advance these articles closer to the checker than the belt type stand. Appellee contends that a checker can reach articles on a belt type stand which is undoubtedly true but if the increased ease with which the checker reaches articles on the George stand is so inconsequential as now argued by appellee why did the appellee adopt the George type stand in preference to the belt type stand?

A further advantage of the new transverse movement of articles on the George check stand is the decreased tendency of customers to handle articles once placed on the turntable and appellee cites no point where the Trial Court considered this advantage. Neither does appellee

cite any testimony controverting the testimony at record page 238-240 that this reduces loss to the store operator.

### Error No. 3 (Check-A-Matic, page 13)

The appellee attempts to overcome the evidence of novel coaction by overly generalizing the functions performed by the check stands and neglects to answer the specific differences which have been pointed out by appellants. Granted that a conveyor belt such as Bradley has an inactive return reach traveling under its upper working reach, no part of the belt moves underneath a cash register or cash register support and since there is no need for positioning a belt under a cash register there can be no suggestion from the Bradley patent and other belt type stands that any part of any conveyer might advantageously be positioned to operate underneath a cash register support. Neither is the stop plate 83 of Bradley (Fig. 10) in any way the equivalent of appellants' stop arrangement, structurally or functionally. It will not cause all articles on the belt to advance to a location *directly* along side of the cash register because as is obvious the majority of items will remain on the outer side of the belt. Appellee attempts to confuse the issue by using the phrase "close to the side of the cash register" to include the entire width of the belt and it fails to consider, as the Court failed to consider, the distinction between transverse movement to *directly* along side a cash register as in George, and parallel movement *in space relation* from the cash register along the outside of the belt as in Bradley and other belt type stands.

The argument at the bottom of page 15 that the gap in the discharge or bagging counter provided for the reception of a weighing scale avoids the designed function of the George discharge counter is spurious. In those check

stands which include a scale well the scale platform is located flush with the adjacent surfaces of the discharge counter and is an effective continuation thereof. Appellee can not, by dividing a counter into two or more panels contend that it no longer amounts to a counter. Actually the length of the rearward extension of the discharge counter of the George patent behind the checker is immaterial so long as some support is there to receive the checked articles and so long as the forward end of the discharge counter is conformed to the edge of the rotating turntable and so long as the discharge counter is positioned with its forward end closely along side of the register support where the rotary movement of articles on the turntable is interrupted. Certainly discharge counters have been arranged as flush continuations of the belt conveyors as in Bradley but the discharge counter of Bradley would not function with a turntable and appellants' contention that there is a novel coaction between the discharge counter with its arcuate front end and the circular turntable and the register support oriented as defined in the claims is reaffirmed. Also reaffirmed is allegation of error 3 that the Trial Court did not consider the novel coaction of parts that provides transverse advancing motion of articles and a clear continuous discharge path in the George stand.

## **GEORGE PATENT IS NOT MERE AGGREGATION**

**(Check-A-Matic, page 17)**

Appellee goes to considerable length to point out that the discharge counter of the patent in suit receives articles from an advancing conveyor and that prior belt type stand did the same thing. This generality is obviously true but neglects to consider the specific differences between the structures and the specific limitations included in the claims. It also neglects to consider the closer prox-

imity to the checker of all articles advanced on the George turntable. The argument further entirely neglects to recognize that the turntable and cash register support of the George patent would be entirely useless and inoperative if left or considered alone. It is essential to the successful operation of all turntable type check stands that the front end of the discharge counter extend from directly along side of the cash register support arcuately around a portion of the periphery of the turntable and the claims are so drawn. An element of a claim which constitutes an essential part of an operative combination can not be considered as an unnecessary element or make the claim invalid for overclaiming. Especially is this so when the new combination produces an improved result. *Oxnard Cannery, Inc. v. Bradley*, (C. A. 9) 194 F. 2d 655. Further, overclaiming or "aggregation" do not exist when the parts of the combination which may be broadly old require modification to fit into the new combination. *In re Bisley*, (C. C. P. A.) 197 F. 2d 355. Note that the old discharge counters in the art require modification to coact with the George turntable. Further the combination claimed should be viewed as a whole rather than as a group of individual elements. *Morrill v. Automatic Industries* (D. C. Mo.) 93 F. S. 697.

#### Error No. 2 (Check-A-Matic, page 19)

Appellee's argument with relation to the sufficiency of the prior art to suggest the combination claimed by George is limited to a citation of points in the record where appellee's expert witness stated what *he* would do if converting the prior art patents to the structure of the George patent. However, this is merely a hindsight reconstruction by this expert or other persons who prepared the charts for the expert and appellee still does not refer to and cannot



refer to any portion of the record which indicates in any way that the prior art in and of itself suggests the combination of elements disclosed for the first time and claimed by George. This same expert expressly declined to state that one or more patents suggested the combination. (Appellants' primary brief page 23), and this same expert expressly stated that if the turntable of the Price patent were to be substituted, as one conveying device for another, for the belt of the Bradley patent *according to the teaching of the Bradley patent* that the turntable would be positioned along side of the cash register support (Appellants' brief page 22). This is clearly distinguishable from the position of the turntable in the George stand *partially underneath* the cash register and appellants' allegation of error 2 is reaffirmed further by the insufficiency of the record to disclose the position of parts claimed by George.

#### **Error No. 7 (Check-A-Matic, page 23)**

Appellee's argument against this citation of error is itself erroneous in that the Bradley patent *was* cited by the Examiner against the George application. The art cited by the Patent Office included the belt type stand of Bradley and the turntables of Trench and Price and Wilcox in remote arts different from the art of grocery store check stands and nothing in the art newly advanced by appellee shows any material difference from the art considered by the Patent Office. The insufficiency of the Florence rotary display device as a conveyor terminating at a checking position has been discussed and will not be considered further.

**Errors 9, 10 and 11 (Check-A-Matic, page 25)**

No statement in the findings of the District Court or its minute order opinion indicates any consideration of the commercial success or the appellee's copying of the patented device. Appellee states that there is no evidence of the Court's failure to consider these points but it is, of course, an impossibility to cite evidence of an omission other than to point to the omission itself. Appellee does not cite any place where it was considered. The same is true of the failure of the trial court to consider the presumption of validity. With reference to error No. 11 on page 26, appellee's contention that other mechanized stands were developed before the George stand is an irrelevant comment. In fact the comment defeats itself because it recognizes that others had been working on mechanized stands long prior to the entry of George into the field. This is exactly appellants' contention that others had tried to mechanize checkout stands but had not been able to succeed to the degree achieved by the patentee George.

**APPELLEE'S ARGUMENT AGAINST INFRINGEMENT****Error No. 8 (Check-A-Matic, page 27)**

The arguments by Check-A-Matic beginning on this page relate to the question of infringement and also the validity of the George patent in as much as they emphasize the completeness with which appellee Check-A-Matic has adopted the structure and concept of the George patent. Appellants will here consider the arguments presented by Check-A-Matic in the same order as in the Check-A-Matic brief.

### CHECK-A-MATIC FD-5 CHECK STAND

Appellee attempts to distinguish its FD-5 stand from the claims of the patent by a distinction in terms. Referring to Exhibit 3 (Record 305) they designate the elongated arm 17 that extends to the center of the turntable as a merchandise guide and separately refer to the shaded segmental panel along the periphery of the turntable as a register support panel. They further point out that the left side edge of the so-called merchandise guide is inclined relative to a true radius of the turntable and point out that articles advanced against this edge will travel along the guide to the outer edge of the turntable if the turntable continues to rotate. This is not controverted by appellants. Appellee takes the position that the so-called merchandise guide is no part of the register support panel and that the inclined article directing edge is not a stop because it does not absolutely stop movement of articles on the turntable.

Appellants contend that the Check-A-Matic arguments are untenable and that the so-called merchandise guide is legally and in fact part of the register support panel. Obviously it extends across the surface of the turntable, and obviously its left side edge acts to interrupt and stop the rotating motion of articles on the turntable. Nothing in the claims of the George patent requires that the articles placed on the turntable shall be brought to a complete and absolute stop and as was pointed out on page 30 of appellants' primary brief, appellee's expert admitted that the function of checking out items of a purchase was the same on the FD-5 Check-A-Matic stand as it was on the stand of the patent in suit insofar as the actions of the checker were considered.



The Court's attention is invited to plaintiff's Exhibit 10C (Record 265) which clearly shows the register supporting function of the so-called merchandise guide of the Check-A-Matic FD-5 check stand. The merchandise guide here appears with its left side edge facing the observer and a circle was drawn by the identifying witness around the supporting block that directly supports the cash register from the merchandise guide. This is one example of a use to which the FD-5 check stand is put in actual practice in the field. Certainly this use includes a register support panel that extends across and above the surface of the turntable and has an article interrupting or stopping edge along its left side as viewed by the checker within the terms of the claims of the George patent.

Appellee Check-A-Matic protests that the blocking up of the forward corner of the cash register from the merchandise guide is the work of the store owner for which Check-A-Matic should not be held responsible. Check-A-Matic further claims that not all of their check stands are used as shown in Exhibit 10C. It is submitted that these arguments are untenable first because the check stand as sold by appellee is obviously adopted for use in the manner illustrated in Exhibit 10C and appellee must be considered as knowing that it might be so used in the trade. Even more important than the question of the register supporting block appearing in Exhibit 10C is the relationship between the right hand end of the so-called merchandise guide and the left edge of the register support panel which appears clearly beneath the front edge of the cash register and extends half way along the depth of the register between the bottom of the cash register and the merchandise guide. Obviously this left edge of the register support panel is supported, at least in part, from the upper surface of the merchandise guide and in turn supports the forward left

corner of the cash register. Thus even if the block encircled in Exhibit 10C were removed and the register placed on the register support panel as suggested by appellee the merchandise guide of the FD-5 would still function to support the cash register by supporting the left edge of the register support panel.

Appellee Check-A-Matic in an attempt to avoid the claims of the George patent has divided the register support structure of its stand into two parts and labeled them separately as the merchandise guide and the register support panel. However, the two parts still function to support the cash register and taken together they extend across the surface of the turntable to function in the same manner as the register support panel of the patent in suit. Appellee cannot by thus dividing one element into two separate parts avoid the infringing character of the parts as they function in combination.

It is respectfully submitted that the application of the claims in suit to the Check-A-Matic FD-5 check stand appearing graphically on appendix pages VI, VII, VIII and IX of appellants' brief, accurately and properly apply the terms of the claims in suit to the FD-5 check stand and fully support appellant's assignment of error No. 8.

In claim 3 as illustrated on page VI the so-called merchandise guide is in fact a part of the register supporting panel as pointed out above and the first element "A" of the claim is properly and graphically associated with the check stand illustrated.

With reference to claim 5 and page VII, the element "D" is properly associated with the merchandise guide as indicating a functional part of the register support panel which extends across the turntable and is therefore above a quadrant of the turntable with the turntable arranged to rotate

freely in closely spaced relationship underneath said support panel. In regards to appellee's argument that the throat area designated by the element "C" is not a discharge counter, it is pointed out again that appellee cannot, by giving different names to parts of their check stand, avoid the infringing character of the stand. The area indicated by the lead line from the element "C" on page VII of appellants' brief is, in fact, the forward end of a discharge counter and it is immaterial that appellee subdivides this discharge counter into a forward end designated as a throat and an intermediate scale platform and a rear area designated as a bagging counter. The parts taken together function as a discharge counter in the manner defined in the claim and as disclosed by the patentee George.

With reference to the application of claim 6 to the FD-5 check stand (appellants' chart VIII) the left side edge of the merchandise guide is, in fact, a stop within the proper meaning of the claim because it interrupts or stops the rotary motion of articles on the turntable. Nothing in the claim requires the word "stop" to have a meaning indicating an absolute stopping of motion of articles on the turntable. Again the appellee's subdivision of the discharge counter into three successive portions cannot avoid the limitation of element "C". To hold otherwise would be to permit practically any patent to be avoided simply by sawing in two any element required and claiming that because one end of the element was not continually connected to the other it would not constitute the equivalent of the part defined by the patent.

With reference to claim 7 and the FD-5 check stand compared graphically on page IX of appellants' main brief the guide arm 17 and the shaded triangular area function together as previously described to form a register support panel as defined in element "C" of the claim as illustrated.

Again appellees cannot avoid the obvious functional purpose of these elements by making them in two pieces and calling one a merchandise guide and the other a register support panel. The argument with reference to the discharge counter element "D" is the same as that just discussed.

### **CHECK-A-MATIC MODEL C-3**

The application of the claims of the patent in suit as graphically set out on pages II, III, IV and V are resubmitted as being fully accurate. Appellee's argument against these applications is that the said edge of the register supporting panel is inclined and therefore does not constitute a stop. As has been already pointed out nothing in the claims requires that the stop do more than interrupt or stop the rotating motion of items on the turntable and appellee's inclining of this stop to obtain an additional radial feeding motion cannot eliminate the function of the stop or change its character to something other than a stop as defined by the claims.

Likewise appellee's subdivision of the discharge counter into separate section cannot avoid the claims or the character of the discharge counter as a whole to perform its article receiving function in the manner disclosed by the patent and for the purpose defined in the claims.

### **CHECK-A-MATIC STANDS USE THE SAME CONCEPT OF OPERATION AS PATENT**

#### **Error No. 8 (Check-A-Matic, page 34)**

Appellee's argument claims a significant distinction between the inclined side edge of their "merchandise guide" and the "stop" at the side of the register support as defined in the claims. It is pointed out first that nowhere in the



findings of the District Court is such a distinction referred to or relied on. The District Court simply failed to compare the actions of the patented and accused stands and the assignment of error is valid.

Further, the alleged distinction is no distinction in fact. In order to sustain their contention appellees must read into the patent an interpretation of the word "stop" as requiring a complete and absolute stopping and full absence of motion of articles on the turntable because of the "stop." No such interpretation is required of the claims and no reference in prior art requires such an interpretation to sustain the validity of the claims. Neither did the applicant's prosecution of the patent in suit interject such an interpretation of the term "stop".

No reference patent shows a check stand with a turntable advancing articles against the side of a register support panel (inclined or otherwise) so the inventor George did not have to use the term "stop" in a restrictive sense to distinguish between an inclined stop that permitted a camming action and a true radial stop that absolutely stopped all motion.

Note that claim 1 of the George patent (R. 254) specifically requires (line 13)

"a second edge of said panel adjacent said first edge *extending radially* from said post across said turn table to form a stop over said turn table,".

Appellee's argument would be valid if the underlined limitation above appeared in the claims in suit *but it does not*. The very fact that the specific limitation to "radially extending" was omitted from the claims in suit indicates no similar limitation was intended or required in the claims in suit. *Western States Machine Co. v. S. S. Hepworth Co.* (C. A. 2), 147 F. 2d 345.

The portion of the file wrapper of the George patent cited by appellee is taken out of context and is inapplicable. At the point cited the inventor was comparing his turntable stand to the belt type stand of Bradley and pointed out that the turntable of the application would stop articles where the Bradley belt it was possible to move articles on past the register without checking. Thus the term "*stop*" referred to stopping articles immediately alongside the cash register and this is just what the accused devices do.

The word "positively" as used by the inventor George early in the prosecution of the application was used in the sense of "assurance" of stopping or interrupting motion rather than in the sense of the "degree or absolute absence" of motion.

### **ACCUSED REGISTER SUPPORT PANEL IS ADJACENT TO DISCHARGE COUNTER**

**(Check-A-Matic, page 36)**

Appellee seeks to avoid infringement on the ground that the scale well of its stands separates the rear end of the discharge counter from the register support panel. This argument is spurious for two reasons. First, as has been pointed out, appellee's division of their discharge counter into a back bagging section, middle scale pan section, and front "throat" section cannot destroy the functional character of the discharge counter as a whole extending rearwardly and functionally continuously from the turntable adjacent the register support panel. Second, the forward "throat" portion of the Check-A-Matic discharge counter is sufficient to meet the requirements of the claims for a discharge counter located "adjacent the register support panel." The claims do not specify how far rearwardly the discharge counter shall extend or what it shall consist of.

The addition of an element (scale well) which in no way affects the operation of the combination claimed does not avoid infringement. *Hazeltine Research, Inc. v. Admiral Corp.* (C. A. 7), 183 F. 2d 953; also *Marchus v. Druge* (C. A. 9), 136 F. 2d 602.

### CASES CITED ARE INAPPLICABLE

(Check-A-Matic, page 36)

The argument and cases presented are irrelevant because appellants do not seek to establish one interpretation for validity and another for infringement. Appellee may have added to the structure and function covered by the patent but it has not substituted for or avoided any of the functions or structure covered by the George patent.



## REPLY TO THE BRIEF OF APPELLEE DU-MORE FIXTURE COMPANY

Appellants first note that while Du-More contends on page 2 of its brief "that there was no admitted novelty of the patented device", appellee follows on page 3 with the comment: "The only admission of the defendants was that in a check stand George was the first one that put a panel over a quadrant of the turntable." It is submitted that the latter statement is clearly an admission of novelty and that appellee starts its brief by at least clouding the issues if not making absolutely unsupportable assertions.

Appellee Du-More goes on at the bottom of page 3 to urge the invalidity of the George patent for overclaiming but it should be noted that the findings and judgment of the District Court (R. 31) were in no way based on the defense of overclaiming. In fact finding 11 (R. 34) expressly eliminates defenses not mentioned. The introduction of the Du-More brief thus further clouds the issue of the sufficiency and correctness of the judgment appealed from. With this preamble, appellants turn to the argument of the Du-More brief.

### MODE OF OPERATION

#### (Du-More, page 7)

The statement that customers load their items of purchase all over the surface of the turntable is only partially accurate and is misleading. Actually the *majority* of items of a purchase are placed in the position most convenient to the customer which is along the periphery of the turntable (R. 107).

Du-More's description on pages 8 and 9 of how various checkers operate the checkstand is accurate but it should

be noted that the alternatives of picking up items before they reach the cash register or letting them abut against the register apply to both the accused and the patented checkstands. Also it must be noted that in comparing belt type stands to patented turntable type stands, the checking positions described by Du-More as the "same general position" are not in fact the same. The belt provides a position or checking area that is dispersed laterally away from the cash register at an ever increasing distance from the checker while the patented George stand provides a checking area that is always directly alongside of the cash register. True, the area extends from the front to the rear of the register but as was pointed out in the reply to the Check-A-Matic brief at page 4 *supra* the *majority of items* will be closest to the checker on the turntable and furthest from the checker on the belt.

As with the case of Check-A-Matic appellants ask: If there is no distinction between the two, why did appellee Du-More adopt the turntable type in preference to the belt type stand? This query applies also to the footnote on page 13 of Du-More's brief and it is noted that the footnote fails to consider the advantage of the George stand that moves articles away from the customer and reduces the tendency for the customers to rehandle the articles, honestly or dishonestly.

On page 12 Du-More cites a number of cases alleged to show that "far more colorable patents" have been held invalid but no comparison of the facts of the cases to the present case are given. The candle case has already been cited by appellants and it is noted that in that case, *all* elements and functions of the combination claimed were found in the *identical* art of candles. This situation is clearly distinguishable from the instant case where the element of a turntable is found only in a remote art and where

the function of *moving articles transversely* to the side of a cash register *is entirely novel*. This fact in itself is submitted to be sufficient to show that the Trial Court's findings were clearly erroneous within the definitions of the cases cited by appellee on pages 14 and 15 of its brief.

Appellants do not controvert the authorities cited by Du-More on pages 16 and 17 but point out that the facts of this case are not comparable. George did not merely substitute a turntable conveyor for a belt conveyor. He devised a new combination and in so doing he modified the old cash register supports and the old discharge counters of the prior art in order to make the new combination operative and obtained a novel result. The cited testimony of the witness Sellers on page 17 of Du-More is merely a hind-sight explanation of what George did and *nothing in this testimony shows where or how the prior art teaches or suggests the changes which George devised to arrive at the new combination*.

On page 13 Du-More repeats the erroneous assertion that a belt type stand brings articles to the same position as the patented turntable type stand. Appellee recognizes that there is a difference in that the turntable goes partly under the cash register and attempts to belittle the difference but this difference is the very thing or relationship that provides the novel and advantageous result of the patented George stand.

With reference to page 20 of Du-More's brief appellee makes an unwarranted assertion, probably hopefully, with reference to the conformation of the front end of the discharge counter. Contrary to appellee's hopes, appellants do contend that the conformation of the front end of the discharge counter to make it fit flush with the turntable as part of a new coaction of parts. It is new, it coacts directly

with the turntable and the register support in bringing the discharge counter close to the cash register and it is necessary to an operative stand.

The quoted testimony and argument on pages 20 and 21 of Du-More is irrelevant because it deals only in generalities of checking out items in a self service store. It omits reference to the detailed improvements within these generalities on which appellants rely. The irrelevancy is emphasized at the top of page 22 by the oft repeated and unwarranted attempt to avoid and cover up the distinction between the checking positions of a belt type stand and the patented George turntable type stand. The "same general area" referred to by appellee begs the issue of this case.

On pages 22 to 24 Du-More attempts to belittle the utility and the advantages of the patented turntable type stand which they have lauded to the public. It is pointed out that while their self interested witness was careful to draw a distinction between belt type stands and non-mechanized stands in court, he made no such distinction in his advertising to the public as shown by plaintiffs' exhibit 30 (R. 298). The advertisement to the public claims unqualified superiority over all other stands, just as do the ads of the other appellees and appellants (R. 13, 25 and 31). It is submitted to be significant that the appellee Check-A-Matic does not attempt to make a similar assertion that the turntable type stand is not an improvement over the belt type stand. Again the question is asked: If the George stand is no improvement over the belt type stand why did appellee adopt it as his product.

If the turntable type stand impedes the vision as suggested by appellee at the top of page 26 without supporting evidence, why does appellee use it?



The price identification advantages of appellants' stand are not ridiculous as is asserted on page 26. Neither can it be established by judicial notice that all checkers check from memory. Otherwise why do stores go to the trouble to stamp the prices on their goods? Checkers probably use both memory and the price stamps. No testimony is needed to establish the fact that as an object comes closer to an observer, its details become clearer and more distinguishable. The advantage of the George stand in making identification of items and prices easier is self-evident and it is recalled that while this advantage may seem insignificant when considering one article and one check operation, it is material when multiplied 10,000 times a day which was established as an average checkers daily work.

To the quoted testimony on page 26-27 must be added the testimony on Record page 240 to the effect that customers do not rehandle articles on appellants' stand. This establishes the advantage of reduced losses because if the checker handles all articles she will check all of them.

The testimony regarding carts alleged on page 27 to be missing is found at page 49 of the record and establishes the advantage of customer convenience with the patented George stand. Since any patentee is entitled to the benefits of his invention, regardless of how used, it is not necessary that the cart handling function be described in the patent.

On pages 28 to 31 appellee Du-More raises the question of overclaiming and the question of the curved inner edge of the discharge counter. The question of overclaiming is discussed and answered in the reply to Check-A-Matic at page 8 *supra*. The curved inner edge of the discharge counter, while originally claimed as novel by George now appears to be anticipated by Muse and is disclaimed, *per se*, by appellants as a point of novelty. This does not alter the fact that claim 6 still contains the patentably novel relationship between the turntable, register support panel and the discharge counter generally.

## DU-MORE INFRINGEMENT

(Du-More Brief, page 32)

The Du-More argument against infringement asserts three points:

1. Du-More has no "stop" because the electric eye is supposed to stop articles before they reach the register support panel.
2. The Du-More register support panel is cantilever supported from the right and so is not supported "from a point adjacent to the discharge counter".
3. The Du-More discharge counter has an angular inner edge and so does not curve concavely arcuately around the back of the checkers' position. (Claim 3.)

Point 1 is adequately disposed of at pages 32 and 40 of appellants' main brief where it is pointed out that the overrun of the turntable carries articles against the side of the cash register and the cash register support panel. It is here further pointed out that nothing in the claims requires that articles touch any part of the register support. The George switch (claim 5) or means (claim 3) for controlling the motor and turntable may stop the turntable before articles touch the register support panel. The electric eye of Du-More is "designed" to do just this. The "stop element" of the George claims is a secondary or safety element to stop articles alongside the cash register in case the checker or the control does not stop them in time. This is just what Du-More's expert said the side edge of its register support panel was available to do if needed.

Referring to the rule noted at page 19, *supra*, in the reply to Check-A-Matic, adding an additional element (the elec-

tric eye) while still retaining all the elements of the claimed combination cannot avoid infringement.

Point 2 is a spurious argument. Appellee did not direct the printing of that portion of the file wrapper to which it refers but it is acknowledged that the words "adjacent to said counter" were added by the applicant George to his claim 13 (now claim 5 in suit). However, this addition was not made in order to distinguish one point of support from any other in the prior art. It was made to orient the location of the register support panel as to its position relative to the discharge counter. As originally presented claim 13 merely called for the register support panel to be "supported above a quadrant of said turntable" and this general requirement would have covered or described a location of the panel over any quadrant including those on the opposite side of the turntable or directly at the end of the discharge counter. In these positions the stand would have been ineffective. The Examiner's first action, paper No. 3, on page 2 rejected all claims as inconsistent and in later pages pointed out inaccuracies and vagueness in other claims. No art was cited against claim 13. The applicant George in his first amendment added the words in question to locate the position of the register support panel. It was not added to locate a point of support as contended by appellee. The irrelevance and inaccuracy of the argument indicates the weakness of appellee's case with reference to infringement. The case of *Graver Tank Co. v. Linde*, 339 U. S. 605, contains an appropriate comment on superficial variations from a patented device where it states:

"One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthwith du-



plication is a dull and very rare type of infringement. *To prohibit no other would place the inventor at the mercy of verbalism and would subordinate substance to form.*" (Emphasis added.)

Note that this same comment is very applicable to Check-A-Matic's use of the separate part called a "merchandise guide" located closely alongside the register support panel and performing the same function as the side edge of the register support panel of the patent in suit.

Point 3 applied only to claim 3 in suit and it is appellants' position that the angularly concave inner edge of the Du-More stand is the full functional equivalent of the concave inner edge required by the claim and that the adjective "arcuate" as used in the claim to qualify the word concave should not be interpreted as strictly limiting the claim.

With the foregoing explanations in mind, the graphical applications of the claims in suit to the Du-More stand as appearing on pages X to XIII of appellants' main brief are submitted to be reasonable, accurate and within the proper legal interpretation of the claims.

### Summary

It is submitted that the points and defenses raised by both appellees are limited to strained and untenable interpretations of words in the patent in suit and unjustifiable comparisons of these interpretations between the structures of the prior art and the structure of the George patent in suit. With reference to the question of infringement it is submitted that the distinctions in structure relied upon by both appellees are inconsequential and immaterial variations of the structure of the George patent in suit.

It is submitted that the 20 numbered point of error and statements of fact appearing at page 42 in the Conclusion of appellants' main brief are accurate and reasonable and that they fully support appellants' prayer for reversal of the judgments of the Trial Court and for a finding of infringement by both appellees.

Respectfully submitted,

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